APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 13, 2007

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 06-11719

EMCON/OWT, INC.,

Petitioner,

versus

SECRETARY OF LABOR, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

March 13, 2007

Before DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

PER CURIAM:

On February 15, 2004, one worker died and three others were injured at the Okeechobee Landfill in Okeechobee, Florida. These workers were employees of the Petitioner, EMCON/OWT, Inc., which was cited for a "serious" OSHA violation as

* Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

a result of this accident. An Administrative Law Judge conducted a full hearing on the citation and affirmed one of the citation items (Item 3), 29 C.F.R. § 1926.651(k)(1), and assessed a penalty of $6,300.00. The ALJ's decision became the final decision of the Occupational Safety and Health Review Commission (OSHRC). Petitioner seeks review of that decision in this Court. 29 U.S.C. §§ 659(c), 660(a) and 661(j).

"To prove a violation of an OSHA standard, the Secretary [of Labor] must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions." *Secretary of Labor v. Southwestern Bell Tele. Co.*, 19 BNA OSHC 1097, 1098, 2000 WL 1424806 (OSHRC No. 98-1748, 2000).

The Commission's decisions are entitled to considerable deference on appellate review. The Occupational Safety and Health Act itself provides "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. § 660(a). "Substantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Fluor Daniel v. Occupational Safety and Health Review Comm'n*, 295 F.3d 1232, 1236 (11th Cir.2002) (citations omitted). "We are mindful that we do not review the record to draw our own conclusions that we then measure against an administrative agency; rather, we must consider *all* of the evidence when drawing our conclusions about the reasonableness of an agency's findings of fact." *Schering-Plough Corp. v. F.T.C.*, 402 F.3d

1056, 1063 (11th Cir.2005) (emphasis added). "Moreover, the legal determinations of an agency like the OSHRC are to be overturned only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Fluor Daniel*, 295 F.3d at 1236; 5 U.S.C. § 706(2)(a).

After considering the briefs and hearing record and conducting oral argument, we find this to be a close case. However, given the deference which must be accorded the Commission's decision, we will not disturb it.

AFFIRMED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES OF AMERICA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION DOCKETED DECEMBER 15, 2005

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

OSHRC Docket No. 04-1406

Secretary of Labor,

Complainant,

v.

EMCON/OWT, Inc.,

Respondent.

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

EMCON/OWT, Inc., contests a citation issued by the Secretary on July 30, 2004. The citation resulted from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Robert Chadwick. Chadwick inspected EMCON's worksite at the Okeechobee Landfill in Okeechobee, Florida, following a fatal accident there. On February 19, 2004, a crew of four

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EMCON employees cut into a leachate clean-out pipe, which released an odorous gas. Two of the crew members passed out and a third, Kenny Warne, died from asphyxiation.

The Secretary charges EMCON with violating three sections of the § 1926.651 excavation standard: § 1926.651(g)(1)(ii), § 1926.651(g)(1)(iv), and § 1926.651(k)(1), items1, 2, and 3 respectively.

EMCON contends the Secretary failed to establish each of the cited items. The undersigned heard the case on February 16 and 17, 2005, in Fort St. Lucie, Florida. The parties submitted post-hearing briefs.

For the reasons discussed below ENICON was not in violation of §§ 1926.651(g)(1)(ii) and (iv). Items 1 and 2 are vacated. EMCON was in violation of § 1926.651(k)(1). Item 3 is affirmed

Issues

The issues are:

(1) Item 1— Did EMCON violate § 1926.651(g)(1)(ii) by failing to take adequate precautions to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen?

(2) Item 2— Did EMCON violate § 1926.651(g)(1)(iv) by failing to conduct testing as often as necessary to ensure the atmosphere was safe when controls intended to reduce the level of atmospheric contaminants were used?

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(3) Item 3—Did EMCON violate § 1926.651(k)(1). by failing to have a competent person inspect the excavation for evidence of a situation that could result in a hazardous atmosphere?

Factual Background

EMCON constructs landfills and installs gas collection systems and leachate management systems. Okeechobee Landfill for Waste Management, Inc. (Waste Management), hired EMCON to expand its existing landfill gas extraction system. The Okeechobee Landfill is perhaps the second largest landfill in the United States. It has a capacity of 145,000,000 cubic yards of space and a site life of approximately 80 years. Landfill users may dump 10,000 to 12,000 tons of garbage a day at Okeechobee.

Landfill contractors lay landfills out in cells. They line the cells with high density polyethylene (HDPE). The Okeechobee Landfill's natural ground level is approximately 50 feet above sea level. Its permit allows the garbage to be filled to 227 feet above sea level. Users of the landfill deposit the garbage in layers. Contractors must install active gas collection systems as the cells fill up close to the grade or to their permitted height.

In early 2004, EMCON had replaced a header line to the gas collection facility and tied in new gas wells with drip legs and condensate lines back to clean-out lines on the cell. Header lines are larger the closer they are to the methane gas flare and smaller the farthest from the gas flare. These header lines act as vacuum lines for the landfill to the gas main. As

the garbage in the landfill cells deteriorates, it generates methane, an odorless gas. The header lines are necessary to pull the methane gas produced by the deterioration of the garbage in the landfill cells.

Lighter than breathable air, methane gas rises over time. Wells located around the landfill vacuum the methane into gas headers to a central location where it is burned off.

Leachate is rainwater leached through the active garbage area. Leachate clean-out lines drain leachate to the landfill's sump area. Landfill contractors install the leachate clean-out lines through the middle of each cell prior to any garbage being deposited. Gravel and a layer of sand 2 feet deep cover the clean-out pipes so that garbage does not come in contact with the pipes, The leachate percolates through the sand and gravel into the collecting lines. There are approximately 1,400 feet of leachate clean-out lines, designed with a 2 percent fall, throughout the landfill. The pipes are perforated in active waste areas so leachate can drain into them.

On February 19, 2004, EMCON's work crew was scheduled to do the final tie–in for the gas extraction system. The crew members were supervisor Johnny Meier, foreman Troy Diloreti, and laborers or field techs Billy Seaborn, Dana Garno, and Kenny Warne. The previous day the crew members had excavated a trench, exposing the leachate clean-out pipe into which they needed to cut. The trench was less than 4 feet in depth.

Meier left the site to get gas and supplies, leaving Troy Diloreti as acting foreman. Seaborn, using a gasoline-

powered chainsaw, cut into the pipe. The pipe released an odorous gas and the chainsaw stopped working. Seaborn exited the trench and went to the job trailer to retrieve a Saws-All electric saw. He was gone for 15 to 20 minutes. When he returned, he re-entered the trench. Instead of cutting into the pipe, Seaborn commented on the foul odor and again exited the trench. Diloreti then entered the trench prepared to make the cut, but he too stopped short and commented on the odor. Warne expressed impatience with his co-workers and entered the trench. He bent downto cut into the pipe, but immediately stood up and said, "Whew." (Tr. 77). Gamo jumped into the trench, bent over the pipe, stood up, and said, "Something is not right." He then passed out (Tr. 77). Seaborn went to help Garno out of the trench. Diloreti looked at Warne and saw he was bleary-eyed and his legs were buckling. Diloreti went over to pull Warne out of the trench but passed out as he was doing so.

A Waste Management operations manager radioed Waste Management district manager Matthew Orr and informed him men were down on the south side of cells 17 and 18. When Orr arrived at the site, he saw the four crew members. Two of them, including Warne, were unconscious. Garno was vomiting and Warne was foaming at the mouth. All were transported to a hospital. Warne died either in transit or at the hospital.

Daryl Lewis was a detective in charge of the crime scene unit for the Okeechobee County Sheriff's Office at the time of the accident. He photographed the site where the EMCON crew was stricken. Dr. Charles Albert Diggs was the Associate Medical Examiner for Okeechobee County. He performed

an autopsy on Warne and concluded the cause of death was asphyxiation due to "acute hydrocarbon (methane) inhalation" (Exh. C-2). Compliance officer Chadwick arrived at the Okeechobee landfill on February 20, the day after the accident. He observed the site and took photographs. He interviewed Waste Management personnel and the EMCON employees. Based upon Chadwick's investigation, the Secretary issued the citation that gave rise to this proceeding.

Discussion

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

The Secretary alleges any violations committed by EMCON were serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violation.

> [T]he Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather [s]he must show that "an accident is possible and there is a substantial probability that death or serious physical harm

> could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH P29,500, p. 39,813 (No. 86-351, 1991)[.]

Flinteo, Inc., 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

Items 1 and 2:
Alleged Serious Violations of §§ 1926.651(g)(1)(ii) and (iv)

Item 1 alleges a violation of § 1926.651(g)(1)(ii).[1] The citation states:

> For the work site located at the Okeechobee Landfill, at the leachate clean out located at the south end of cells #17 and #18. On 2/19/04 four employees were in the process of cutting into the eight (8) inch High Density Polyethylene (HDPE) leachate collection pipe that was located in an excavation which was approximately three (3) feet deep. Adequate precautions were not taken to protect the employees from a hazardous methane atmosphere which escaped from the cut in the leachate pipe, and accumulated within the

1. The standard requires: Adequate precautions shall be taken to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen and other hazardous atmospheres. These precautions include providing proper respiratory protection or ventilation in accordance with subparts D and E of this part respectively.

excavation. The employees were overcome by the hazardous methane atmosphere.

Item 2 alleges a violation of § 1926.651(g)(1)(iv).[2] The citation states:

For the work site located at the Okeechobee Landfill, at the leachate clean out located at the south end of cells #17 and #18. On 2/19/04 employees were in the process of cutting into the eight (8) inch High Density (HDPE) leachate collection pipe that was located in an excavation which was approximately three (3) feet deep. After the initial cut was made into the leachate pipe, an atmosphere developed in the excavation which caused adverse effects to the employees. The excavation was vacated for a period of time so that the natural air movement at the work area could air-out, or ventilate, the excavation. Employees were allowed to go back into the excavation without conducting any air sampling, or exposure monitoring, to detect the presence of the reasonably expected hazardous atmosphere that may still be present in the excavation, or to determine the actual level of the hazardous atmosphere that may be present. As a result of the failure to conduct the necessary air sampling, or exposure monitoring, the employees working

2. The standard requires: When controls are used that are intended to reduce the level of atmospheric contaminants to acceptable levels, testing shall be conducted as often as necessary to ensure that the atmosphere remains safe.

in the excavation were overcome by a hazardous methane atmosphere.

1. *Application of Standards*

Section 1926.651 is captioned "Specific excavation requirements." Section 1926.651(g) is captioned "*Hazardous atmospheres,*" Section 1926.651(g)(1)(i) provides:

> Where oxygen deficiency (atmospheres containing less than 19.5 percent oxygen) or a hazardous atmosphere exists or could reasonably be expected to exist, such as in excavations in landfill areas or excavations in areas where hazardous substances are stored nearby, the atmospheres in the excavation shall be tested before employees enter *excavations greater than 4 feet* (1.22 in) in depth (emphasis added),

Immediately following this subparagraph are § 1926.651(g)(1)(ii), (ii), and (iv). EMCON argues §§ 1926.651(g)(1)(i) through (g)(1)(iv) must be read as a whole to properly understand the context. Under this interpretation, subparagraphs (g)(1)(ii) through (g)(1)(iv) apply only if the requirements of subparagraph (g)(1)(i) apply to the cited conditions. Section 1926.651(g)(1)(i) applies only to excavations greater than 4 feet in depth. EMCON argues the three subparagraphs that follow also apply only to excavations greater than 4 feet in depth. Estimates of the depth of the excavation at issue vary, but none of them exceeds 4 feet, nor does the Secretary contend the excavation was deeper than 4 feet.

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The Secretary calls EMCON's argument "strained reasoning" (Secretary's brief, p. 15) but does not otherwise refute it.

Reading § 1926.651(g)(1) in its entirety supports EMCON's argument. Only certain excavations need to be tested for hazardous atmospheres—those in landfill areas or in areas where hazardous substances are stored nearby, for example. Section 1926.651(g)(1)(i) requires testing for these excavations, where hazardous atmospheres could reasonably be expected to exist, if they are greater than 4 feet in depth. Section 1926.651(g)(1)(ii) requires the employer to take adequate precautions "to prevent employee exposure to atmospheres containing less than 19.5 percent oxygen and other hazardous atmosphere." Section 1926.651(g)(1)(iv) requires the employer to conduct additional testing when controls are used to reduce the level of atmospheric contaminants. Unlike § 1926.651(g)(1)(i), §§ 1926.651(g)(1)(ii) and (iv) do not refer to areas where a hazardous atmosphere could reasonably be expected to exist; they address areas where the hazardous atmosphere apparently is known to exist. Section 1926.651(g)(1)(ii), thus, presumes testing has already established the atmosphere is hazardous. The ordering of the subparagraphs presents a logical progression. If testing establishes a hazardous atmosphere exists, then adequate precautions are required. If testing establishes a hazardous atmosphere exists and controls are used, then additional testing is required.

The Secretary contends the subparagraphs can be read in isolation. If her reading were correct, the employer would first be required to conduct testing in order to determine

whether it had to take the additional steps outlined in subparagraphs (ii) through (iv). This interpretation renders § 1926.651(g)(1)(i) meaningless. The alternative would be to comply with the requirements of subparagraphs (ii) through (iv) regardless of testing, an approach explicitly rejected in the preamble to § 1926.651 (54 F. R. 45894, 45920 (1989)):

> OSHA received six comments and input from ACCSH [Advisory committee on Construction Safety and Health] on this requirement. Two commenters [Exs. 4-25 and 4-67] objected to the requirement for testing the atmosphere, noting that the gas industry normally tests for hazardous atmospheres. Both commenters also contended respiratory protection or ventilation should be permitted in lieu of testing. OSHA notes that respiratory protection or ventilation is required by § 1926.651(g)(1)(ii) of this final rule, and the requirement for testing establishes what, if any, precautions or additional precautions are necessary. If an employer chooses to provide adequate employee protection in accordance with the appropriate regulations as a matter of procedure, the failure to test would be de minimis.

According to the preamble, use of adequate precautions required by § 1926.651(g)(1)(ii) is contingent upon the establishment, by testing, of a hazardous atmosphere. Because testing is not required in excavations less than 4 feet in depth, §§ 1926.651(g)(1)(ii) through (iv) do not apply to excavations less than 4 feet in depth.

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The excavation at issue was less than 4 feet in depth. Therefore, §§ 1926.651(g)(1)(ii) and (iv) do not apply to it. Items 1 and 2 are vacated.

Item 3: Alleged Serious Violation of § 1926.651(k)(1)

Item 3 alleges a violation of § 1926.651(k)(l)[3]

> For the work site located at the Okeechobee Landfill, at the leachate clean out located at the south end of cell #17 and #18. On 2/19/04 employees were in the process of cutting into the eight (8) inch High Density Polyethylene (HDPE) leachate collection pipe that was located in an excavation which was approximately three (3) feet deep. After the initial cut was made into the leachate pipe, an atmosphere developed in the excavation which caused adverse effects to the employees. The excavation was vacated for a period of time so that the natural air movement at the work area could air-out, or ventilate, the excavation. At this time a competent person did

3. The standard requires: Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

not stop the work in the excavation and conduct, or arrange to have the appropriate person conduct, air sampling to determine what hazardous atmosphere may be present, and what levels of that hazardous atmosphere were present. After the air-out period it was assumed that it would be safe to reenter the excavation and employees were allowed to go back into the excavation without conducting any air sampling, or exposure monitoring, to detect the presence of the reasonably expected hazardous atmosphere that may still be present in the excavation. As the result of a competent person's failure to recognize the possible hazardous working condition, and failure to conduct the necessary air sampling, and failure to initiate the appropriate corrective actions, the employees that reentered the excavation were overcome by a hazardous methane atmosphere.

1. Application of Standard

Although the excavation at issue was less than 4 feet in depth, there is no question it was an excavation as defined by § 1926.650(b): "[A]ny man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." Section 1926.651(k)(1) applies to the excavation made to expose the leachate pipe.

2. Noncompliance with Terms of Standard

The Secretary considers Diloreti to be EMCON's designated competent person on the site and argues he was

not qualified. EMCON considers only supervisor Meier to be its designated competent person. EMCON argues Meier conducted an inspection of the excavation the morning of February 19, 2004, before work, in compliance with § 1926.651(k)(1). The standard does not require the competent person to remain on site for the entire workday. At the time Meier left the site to get supplies, EMCON argues, he had complied with § 1926.6510(k).

Section 1926.650(b) defines "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." Neither the definition standard nor the cited standard refers to the competent person as "designated." Thus, the formal designation assigned an employee is not as significant as the employee's qualifications and authority. EMCON designated Meier, supervisor, as the competent person, but it was Diloreti, as acting foreman, who was in the position of authority when an inspection was required.

EMCON's focus is on the first two sentences of the standard, requiring an inspection prior to the start of work, which Meier conducted. But the Secretary makes it clear in the citation the alleged violation occurred when a competent person failed to conduct an inspection of the excavation *after* the crew cut into the leachate pipe. It is the last two, not the first two, sentences of § 1926.651(k)(1) that are at issue:

> Inspections shall also be made after every rainstorm or other hazard increasing occurrence.

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These inspections are only required when employee exposure can be reasonably anticipated.

The hazard increasing occurrence in this instance was the cut made in the leachate pipe. The cut released some gas (the Secretary speculates it was methane, but this was never conclusively established) into the immediate atmosphere, causing irritation, and eventually asphyxiation, in the crew members. Section 1926.651(k)(1) requires an inspection "when employee exposure can be reasonably anticipated." Reasonable anticipation of employee exposure was raised by three incidents over a span of approximately 20 minutes: the gas chain-saw stopped, indicating a lack of oxygen in the atmosphere; a strong, unpleasant odor arose from the leachate pipe; and each crew member suffered immediate physical discomfort upon entering the excavation to make the second cut. These incidents were, all the witnesses agreed, unusual in their experience. Diloreti knew there were gas meters in the truck. Retrieving the Saws-All had already delayed work on the leachate pipe. Testing the atmosphere with a gas meter would have been the reasonable action to take by Diloreti, as acting foreman.

EMCON cannot escape the requirements of the second part of § 1926.651(k)(1) by claiming its competent person was off site after making the first required inspection. While the standard does not require a competent person's constant presence on site, it does require a competent person to conduct an inspection after a hazard increasing occurrence. This was not done in the present case.

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Diloreti had worked for EMCON for ten and a half years at the time of the hearing (Tr. 245). In the month and a half EMCON had been on the Okeechobee site prior to Warne's death, Meier had designated Diloreti as acting foreman at least once a week (Tr. 257-258). Diloreti testified he had never received competent person training, he only vaguely understood the term "competent person," and it had never occurred to him to test the excavation with a gas meter after the crew cut the leachate pipe (Tr. 259-263).

> Under Commission precedent, a person is found to be competent when he makes an inspection in a competent manner and makes a reasonable determination that the condition is safe. . . . [E]xperience alone does not qualify the designated employee as a "competent person."

Superior Masonly Builders, 20 BNA OSHC 1182 (No. 96-1043, 2005). Where inspections are insufficient to identify a recognizable hazard, the employer is in noncompliance with the requirement that inspections be conducted by a competent person. *DiGioia Brothers Excavating*, 17 BNA OSHC 1181, 1184 (No. 92-3024, 1995).

Diloreti was not qualified to act as a competent person. He was unable to identify a recognizable hazard when his crew members showed signs of physical discomfort when exposed to gas released by the leachate pipe. No competent person conducted an inspection of the excavation following the hazard increasing occurrence. EMCON failed to comply with the terms of the standard.

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3. Employee Exposure

Four EMCON employees were exposed to the hazard created when EMCON failed to have a competent person conduct an inspection of the excavation following a hazard increasing occurrence. Kenny Warne died from exposure to the hazardous condition. The other three crew members present were hospitalized. The Secretary has established employee exposure to the hazardous condition.

4. Knowledge

The Secretary contends EMCON had constructive knowledge of the violation of § 1926.651(k)(1). Constructive knowledge is shown if the employer could have known of the violative condition with the exercise of reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, and to take measures to prevent the occurrence of the violation. *Pride Oil Well Service,* 15 BNA OSHC 1809 (No. 87-692, 1992).

Diloreti testified that, along with Meier, he considered himself qualified as a competent person. When asked why, Diloreti responded (Tr. 263):

> I felt safe as far as, like, you know, my digging, my benching, knowing if there was a problem or whatnot. I mean, in the ten years that I had been there, I went from a laborer to a technician to an

> operator to a foreman. I feel that I was competent enough, you know, to succeed with my career.

Diloreti said nothing regarding hazardous atmospheres. As noted, EMCON did not provide him with competent person training. EMCON was not reasonably diligent in training its employees, especially employees who took on supervisory roles, to recognize potentially hazardous situations and to take steps to prevent employee exposure to a hazardous atmosphere. Diloreti's knowledge of the foul smell and of his crew members' reaction to it are imputed to EMCON. *Globe Contractors, Inc. v Hern,* 132 F.3d 367, 373 (7th Cir. 1997).

The Secretary has established a serious violation of § 1926.651(k)(1).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

EMCON employs more than 250 employees (Tr. 150-151). The company had no history of violations in the three years prior to the inspection at issue (Tr. 151). EMCON demonstrated good faith throughout the proceedings.

The gravity of the violation is high. Failure to comply with § 1926.651(k) and to test the atmosphere in this instance likely contributed to the death of an employee.

It is determined the appropriate penalty for this item is $6,300.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the citation, alleging a violation of § 1926.651(g)(1)(ii), is vacated and no penalty is assessed;

2. Item 2 of the citation, alleging a violation of § 1926.651(g)(1)(iv), is vacated and no penalty is assessed; and

3. Item 3 of the citation, alleging a violation of § 1926,651(k)(1), is affirmed, and a penalty of $6,300.00 is assessed.

/S/ NANCY J. SPIES
NANCY J. SPIES
Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 14, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-11719-DD

EMCON/OWT, INC.,

Petitioner,

versus

SECRETARY OF LABOR, THE OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION,

Respondents-Appellees.

Petition for Review of an Order of the Occupational Safety and Health Review Commission

BEFORE: DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

PER CURIAM:

The petition for rehearing filed by Petitioner, EMCON/OWT, Inc. is DENIED.

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* Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

Appendix C

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX D — RELEVANT CODES OF FEDERAL REGULATION

§ 1926.650 Scope, application, and definitions applicable to this subpart.

(a) *Scope and application.* This subpart applies to all open excavations made in the earth's surface. Excavations are defined to include trenches.

(b) *Definitions applicable to this subpart.*

* * *

Competent person means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

* * *

Excavation means any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.

* * *

Hazardous atmosphere means an atmosphere which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritating, oxygen deficient, toxic, or otherwise harmful, may cause death, illness, or injury.

* * * *

Appendix D

§ 1926.651 Specific excavation requirements.

* * *

(k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rainstorm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

(2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

(l) Walkways shall be provided where employees or equipment are required or permitted to cross over excavations. Guardrails which comply with § 1926.502(b) shall be provided where walkways are 6 feet (1.8 m) or more above lower levels.